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NO. 81-2219

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

TRAN QUI THAN, PETITIONER,

v.

DONALD T. REGAN,
SECRETARY OF THE TREASURY

PETITIONER'S REPLY BRIEF

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This reply brief addresses several arguments first raised in respondent's brief in opposition ("Br. Op.").

1. The record belies respondent's repeated assertion that his case is "largely fact-bound" (Br. Op. 10, 14).

There was no dispute below as to the material facts, and the petitioner does not challenge any factual determinations here. It was uncontested that when the

Communist forces overran South Vietnam, the Dong Phuong Bank in Saigon, a private Bank, had assets in the United States consisting of a debt owed to the Bank by the U.S. Army. The Bank was confiscated by the Communists, but the debt escaped the confiscators' reach. Petitioner and most of his fellow shareholder-directors escaped from Vietnam and are now either in this country or elsewhere in the Free World. Petitioner seeks to recover the Bank's American-based assets and challenges respondent's withholding of the assets for potential use as a "bargaining chip" in future negotiations with the Vietnamese Communists.

Petitioner relied below in part on the resolution issued in Saigon on April 15, 1975, by the shareholder-directors

authorizing them, inter alia, to "manage and make use of . . . properties that the Dong Phuong Bank possesses abroad." (Pet. 12; Pet. App. A4 n.2). The respondent's predecessor ruled that this resolution was ineffective to dissolve the corporation or to transfer its assests to the shareholder-directors (Pet. App.D3-D4), and the courts below upheld this determination (Pet. App. A21-A23). Respondent now urges that this factual determination is dispositive of petitioner's claim. We disagree.

We submit that under the chaotic conditions under which the shareholder resolution was passed, it is legally of no moment whether the resolution formally dissolved the Bank, and whether it transferred the Bank's assets to the shareholder-directors. The governing

principle of law was settled in this country in the 1920's when Soviet confiscations and destruction of Russian corporations having assets in the United States came before the courts. The genius of the common law developed the principle that where a legal entity established under foreign law has assets in this country, and the entity is confiscated and destroyed at the place of its incorporation, the entity continues its legal existence in this country for purposes of protecting its American-based assets; furthermore, the former directors of the entity continue to be authorized to represent the entity and to recover its American-based assets. Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 263 N.Y. 263, 170 N.E. 479, 485-486 (1930), cert. denied,

282 U.S. 878 (1930); James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 363, 367 (1928).

That principle, we submit, is for application here. Respondent fails to address our legal submission, and disposes of the authorities with silence.

2. We take strong exception to respondent's attempt to interject a new factual issue in this Court. In an effort to question petitioner's right to recover the Dong Phuong Bank's American-based assets, respondent speculates that there may be creditors who may have claims to the Bank's assets. He suggests that "it is not unreasonable to assume that the Bank had substantial creditors in Vietnam and perhaps elsewhere. . . . Finally, even as to the particular payment due to the Bank under the Army

contract in this case, petitioner failed to establish what amount, if any, was due to the Bank." (Br. Op. 19, n. 10) 1/

No such contention was raised--or could have been raised--by the respondent at the administrative level or in the courts below. The debt owed to the Dong Phuong Bank by the U.S. Army was conceded. (Pet. 10). There is nothing in the freezing regulations administered by the respondent authorizing him to investigate whether a person seeking the return of frozen property has any creditors, nor has the respondent been charged with the task of administering a

1/ Elsewhere, respondent goes farther and asserts that "petitioner failed to establish the extent of his interest in the assets involved here. There was, for example, no proof that there would be any net assets left after payment of the Bank's depositors and other creditors." (Br. Op. 21).

bankruptcy or liquidation program on behalf of creditors in Vietnam or elsewhere. The identical contention which is now being voiced by the respondent was summarily rejected over half a century ago by (then) Judge Cardozo in the Petrogradsky case, supra, when a New York bank resisted turning over American-based assets of a Russian bank confiscated by the Soviets to refugee-directors:

> The directors, men of honor presumably, will be charged with the duties of trustees, and will be subject to prosecution, civil or criminal, if those duties are ignored. Defendant is not required to follow the money into their hands to see how they apply it. Its duty is to pay. [170 N.E. at 486.]

3. Respondent urges that this Court's recent decision in Dames & Moore v. Regan, 453 U.S. 654 (1981) is somehow

dispositive of the question raised in the petition (Br. Op. 10-12). He contends that petitioner has not advanced any reason for this Court to examine the principles reviewed in Dames & Moore "as applied to corporately owned Vietnamese assets in this country." (Br. Op. 12).

We would have sought that this Court made it clear beyond peradventure that its decision in Dames & Moore was of the narrowest compass (453 U.S., at 686-688). The property involved there, which the President himself had frozen following an explicit declaration of a national emergency vis-a-vis Iran, consisted of "property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the

United States . . ." (Emphasis added; 453 U.S., at 663-664). 2/ The Dames & Moore Court held that in settling a major foreign policy dispute between the United States and Iran, the President was empowered to suspend claims pending against Iran in U.S. courts; to unfreeze Iranian governmental assets; and to require claimants to assert their claims in an alternate forum established by agreement with Iran.

2/ In contrast, here there was no Presidential declaration of a national emergency vis-a-vis Vietnam. The freezing of Vietnamese property in this country was justified by the national emergency proclaimed by President Truman on December 16, 1950 as a result of the Korean conflict. 64 Stat. A454. The freeze was not imposed by the President, but by a low-level official in the Department of the Treasury, the "Acting Director, Office of Foreign Assets Control." 40 Fed. Reg. 19202 (May 2, 1975).

We do not question the Executive's right to freeze property of a foreign state which becomes the target of economic sanctions imposed by the Executive in times of a declared emergency, and to use such government-owned property for settlement purposes. Nor do we question the Executive's right to freeze property belonging to residents of a state against which economic sanctions are imposed, so as to deny to such state or its residents access to U.S. currency. (Pet. 28). This case, however, deals exclusively with privately-owned property in the United States, claimed by refugees outside of the state which is the target of the Executive's sanctions. Petitioner is being indefinitely denied the benefit and use of his private property solely on the

ground that the Executive may wish to use the property as a "bargaining chip" in future negotiations with the Communists in Vietnam. Nothing that this Court decided or stated in Dames & Moore is dispositive of petitioner's claim here.

4. Kaufman v. Societe Internationale, 343 U.S. 156 (1952), teaches that where corporate assets are seized under the authority of the Trading with the Enemy Act, the plight of innocent stockholders must be considered before the corporate assets can be appropriated for a public use. (Pet. 25-26). Respondent dismisses Kaufman with the trite observation that that case "involved the vesting of assets in which non-enemy aliens and American citizens had an interest . . . . [T]here has been no such vesting of the Dong Phuong Bank's

American-based assets that might permanently deprive the shareholders of their ability to recover compensation for their interest in the firm" (Br. Op. 20, n. 11; see also id., at 21-22). To distance himself from Kaufman, respondent repeats by rote that petitioner's property here has been only "temporarily blocked" (Br. Op. 20, 21, 22), and he suggests that the 7-1/2 year blocking of petitioner's property is not unduly burdensome when measured against the 30-year blocking of Chinese assets and the 20-year blocking of Cuban assets (Br. Op. 21-22).

The duration of the blocking, we submit, is of no constitutional relevance. If, as we maintain (Pet. 26-27), an alien friend's property in this country enjoys the same constitutional

protections as property belonging to citizens, the alien's property may not be requisitioned for a public use in total disregard of the mandates of the Fifth Amendment.

We respectfully urge that this Court review the legality of the Executive's use of private property belonging to an alien friend as a "bargaining chip" in the furtherance of the foreign policy interests of the United States.

Respectfully submitted,

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